Supreme Court, U.S.
FILED
SEP 16 1970
E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

No. 5876

MICHAEL JAMES CASSIDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BARRY R. HIRSCHFIELD
ATTORNEY AT LAW
2328 Valdez Street
Oakland, California 94612
On behalf of Petitioner,
Michael James Cassidy,
in forma pauperis

FORM 131

Michael James Cassidy prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on June 17, 1970.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit has not been reported in the official reporter on the date of this Petition, however, a copy of the opinion is attached to the Petition as Exhibit "A".

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was made and entered on June 17, 1970 and a copy thereof is attached to this Petition as Exhibit "B".

A motion for an extention of time within which to file a Petition For Writ of Certiorari was granted by the Supreme Court on July 28, 1970, extending Petitioner's time for filing until August 16, 1970.

Jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

QUESTIONS PRESENTED

Michael James Cassidy was convicted of bank robbery following his withdrawal of a plea of not guilty and his making of a plea of guilty to the charge. At the time the Court accepted the guilty plea it was aware that Petitioner had been under the influence of LSD at the time of the robbery. Since the entry of the judgment of conviction, the United States Court of Appeals for the Ninth Circuit in Wade v. United States (9CA 1970) 426 F.2d 64 changed the rule of the defense of "legal insanity" from the

narrow "knowledge of right-wrong test" as follows:

> In order for insanity to be a legal defense to the commission of a crime there must be:
> (a) Such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong; or
> (b) he must be unconscious and unaware of the nature of the act at the time he is committing it; or
> (c) where though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will or the governing power of his mind, has been otherwise than voluntarily, so completely destroyed that his actions are not subject to it, but are beyond his control. Anderson v. United States (9CA 1956) 237 F2d 118, Sauer v. United States (9CA 1957) 241 F2d 640.

to the broader American Law Institute "substantial capacity" test as follows:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Wade v. United States, Supra.

The new legal insanity rule for the Ninth Circuit is effective retroactively prior to the Petitioner's plea of guilty. Wade v. United States, Supra.

1. Was the Petitioner deprived of effective assistance of counsel when he was advised to plead guilty to the charge of bank robbery and thereby waive his insanity defense?

2. Was there a factual basis under Rule 11, F.R.C.P. for the guilty plea to bank robbery, where the petitioner was under the influence of LSD at the time of the robbery?

3. Was the factual basis for the guilty plea precluded by the creation of a broader legal insanity rule which applies retroactively to the time of Petitioner's guilty plea?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Rule 11 of the Federal Rules of Criminal Procedure as set forth under Title 18 United States Codes.

Sixth Amendment of the Constitution of the United States (right to assistance of counsel).

STATEMENT OF THE CASE

On or about January 23, 1969, Michael James Cassidy was arrested for armed bank robbery. On January 31, 1969, James Chapman, Esq. was appointed by the Court as Cassidy's defense counsel. (C.T. 4).

On February 12, 1969, an indictment was filed with the United States District Court for the Southern District of California charging Michael James Cassidy with a violation of Title 18, U.S.C. Section 2113(a) Bank Robbery (C.T. 2).

On March 27, 1969, the United States filed a complaint against Michael James Cassidy charging him with a violation of Title 18, U.S.C. Sections 2113(a) and (d). (R.T. p. 5).

On February 17, 1969, Michael James Cassidy was arraigned and pleaded not guilty to the charge. (C.T. 6;R.T. 304). Thereafter, on May 25, 1969, Michael James Cassidy changed his plea of not guilty and pleaded guilty to the charge in the indictment, to wit: 18 U.S.C. Section 2113(a).(C.T. 14; R.T. 7-14).

On August 6, 1969, a judgment of conviction upon the plea of guilty was made and Michael James Cassidy was sentenced to twenty years imprisonment. (C.T. 16; R.T. 17-29).

On August 15, 1969, a letter to the Court from Michael James Cassidy was ordered filed as notice of appeal. (C.T. 17-18).

During the course of the proceedings in the District Court, Cassidy's attorney, James Chapman, made a motion to suppress certain admissions involuntarily made by Cassidy while he was under arrest, shortly after the robbery and at a time when he was still under the influence of LSD. (R.T. 7-12). The motion was granted by the Court on May 12, 1969. (R.T. 13).

On May 25, 1969, at the time he changed his plea to guilty, Michael James Cassidy informed the Court that at the time of the robbery he was loaded on LSD and that he could not remember all the details of the robbery. (R.T. 10). He further stated to the Court that he did not plan the robbery; it just happened. (R.T. 12). He also stated to the Court that he knew what he was doing (R.T. 12). Cassidy further stated to the Court that he did not plan the robbery. He had been going to the drugstore from his motel and remembered that there was a gun in the car, Apparently, spurred by an impulse, he robbed the bank. In doing so, he convinced the teller of his determination and displayed the gun which was tucked under his belt, by raising his sweatshirt. (R.T. 12).

On June 17, 1970, The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. On July 2, 1970, the United States Court of Appeals for the Ninth Circuit ordered that the issuance of its mandate be stayed pending the outcome of the proceedings in the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

1. The decision below should be reviewed because it hastily dismisses a full and proper consideration of the obligations of appointed defense counsel to properly defend an accused. In the case under review, there was no strategic value in pleading Petitioner guilty to bank robbery and,

thereby, waive a thorough judicial consideration of the effects of LSD on Petitioner's mental capacity at the time of the robbery. Even if Petitioner had been proved guilty at trial, he would have received all the judicial benifits of a guilty plea for sentencing purposes, in that he would be admitting all the facts of the crime as he developed an insanity defense.

The important issue to be decided by the Supreme Court is what degree of effort and ingenuity is required of appointed defense counsel in order to provide "effective assistance" to his client as required under the Sixth Amendment of the United States Constitution and in what situations can a defense counsel properly concede his client's possible defenses to the crime charged. Powell v. Alabama (1932) 287 U.S. 45; Hawk v. Olson (1945) 326 U.S. 271; Reese v. Georgia (1955) 350 U.S. 85.

2. The decision below should be reviewed because it erroneously decided that there was a factual basis for Petitioner's guilty plea despite his statement and the Court's recognition that at the time of the robbery he was under the influence of LSD. Any intent to commit the robbery would be seriously impaired by the ingestion and influence of LSD upon the mental faculties. The statement by petitioner that he was under the influence of LSD at the time of the robbery should have sufficiently qualified the guilty plea so as to compel the Court, in the interest of Justice, to refuse to accept the plea and require petitioner to proceed to trial upon the appropriate defense. McCarthy v. United States (1969) 394 U.S. 459; Hulsey v. United States (5CA 1966) 369 F2d 284.

3. The fact that the Ninth Circuit adopted a broader "legal insanity" defense rule, which rule is retroactive to the time of Petitioner's guilty plea, requires a vacation of the judgment of the trial court and a reconsideration of the factual basis upon which the guilty plea relied. See

United States v. Wade, Supra.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be granted.

September 14, 1970

Barry A. Hirschfeld
Attorney For Petitioner,
Michael James Cassidy.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over 18 years of age, and not a party to the within entitled action: I am employed at and my business address is [illegible] Oakland, California On this date I served the attached document by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid in the United States mail at Oakland addressed as shown below. I declare under penalty of perjury that the foregoing is true and [illegible] Executed at Oakland, California on [illegible]

Barry A. Hirschfeld

United States Attorney
Justice Dept.
325 West F Street
San Diego, California

Michael James Cassidy A33616-136
P.O. Box 1000
Steilacoom, Washington

Clerk
U.S. Court of Appeals for the Ninth Circuit
7th & Mission Street
San Francisco, California 94101

FORM 101

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. MICHAEL JAMES CASSIDY, *Defendant-Appellant.*	No. 24,973

[June 17, 1970]

On Appeal from the United States District Court for the Southern District of California

---

Before: MERRILL, HUFSTEDLER and KILKENNY, Circuit Judges

Per Curiam:

This appeal is taken from a conviction for bank robbery under 18 U.S.C. §2113(a) following a guilty plea. Appellant pleaded guilty on advice of counsel, apparently in the hope that the plea and sentencing under the lesser offense[1] would result in a shorter prison term.[2] During the course of the inquiry required under Rule 11, F.R.Crim.P., appellant disclosed that at the time of the robbery he was under the influence of LSD. He also asserted that he had known what he was doing when he robbed the bank.

On appeal appellant contends that he was not adequately represented by counsel since counsel should have known that appellant's

---

[1] 18 U.S.C. §2113(a), bank robbery "by force or violence, or by intimidation," carries a maximum sentence of 20 years' imprisonment and a $5,000 fine. 18 U.S.C. §2113(d), bank robbery where life is put in jeopardy, under which appellant was originally charged, carries a maximum sentence of 25 years' imprisonment and a fine of $10,000.

[2] Appellant received the maximum 20-year sentence provided for under §2113(a).

best course was to plead not guilty and assert the defense of insanity.

Regardless of whether on these facts there was a probable insanity defense—a question we do not reach—it is clear that the guilty plea, given the strong evidence against appellant, was a valid alternative choice. Thus counsel's advice cannot be said to have fallen short of the required measure of competence. *Parker v. North Carolina*, ___ U.S. ___ (May 4, 1970); *Bouchard v. United States*, 344 F.2d 872, 874 (9th Cir. 1965).

Appellant also contends that the acceptance of the guilty plea by the District Court under these circumstances was error, since the fact that appellant was under the influence of LSD negated one of the elements of the crime (intent). We disagree. The District Court's inquiry satisfied the requirements of Rule 11 in this regard, and acceptance of the plea was entirely proper.

Judgment affirmed.

EXHIBIT "A"

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 6-19-70—325

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 17 1970

WM. B. LUCK, CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL JAMES CASSIDY,

Defendant-Appellant.

No. 24,973

On Appeal from the United States District Court for the Southern District of California

Before: MERRILL, HUFSTEDLER and KILKENNY, Circuit Judges

Per Curiam:

This appeal is taken from a conviction for bank robbery under 18 U.S.C. §2113(a) following a guilty plea. Appellant pleaded guilty on advice of counsel, apparently in the hope that the plea and sentencing under the lesser offense[1] would result in a shorter prison term.[2] During the course of the inquiry required under Rule 11, F.R.Crim.P., appellant disclosed that at the time of the robbery he was under the influence of LSD. He also asserted that he had known what he was doing when he robbed the bank.

On appeal appellant contends that he was not adequately represented by counsel since counsel should have known that appellant's best course was to plead not guilty and assert the defense of insanity.

Regardless of whether on these facts there was a probable insanity defense - a question we do not reach - it is clear that the guilty plea, given the strong evidence

EXHIBIT "B"

against appellant, was a valid alternative choice. Thus counsel's advice cannot be said to have fallen short of the required measure of competence. Parker v. North Carolina, ___ U.S. ___ (May 4, 1970); Bouchard v. United States 344 F.2d 872, 874 (9th Cir. 1965).

Appellant also contends that the acceptance of the guilty plea by the District Court under these circumstances was error, since the fact that appellant was under the influence of LSD negated one of the elements of the crime (intent). We disagree. The District Court's inquiry satisfied the requirements of Rule 11 in this regard, and acceptance of the plea was entirely proper.

Judgment affirmed.

FOOTNOTES

1. (Page 1) 18 U.S.C. §2113(a), bank robbery "by force or violence, or by intimidation," carries a maximum sentence of 20 years' imprisonment and a $5,000 fine. 18 U.S.C. §2113(d), bank robbery where life is put in jeopardy, under which appellant was originally charged, carries a maximum sentence of 25 years' imprisonment and a fine of $10,000.

2. (Page 1) Appellant received the maximum 20-year sentence provided for under §2113(a).